

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: John Butler	Team: Squad #5	CCRB Case #: 201601869	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Monday, 03/07/2016 7:00 PM	Location of Incident: § 87(2)(b)	Precinct: 05	18 Mo. SOL 9/7/2017	EO SOL 9/7/2017	
Date/Time CV Reported Tue, 03/08/2016 8:23 AM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Tue, 03/08/2016 8:23 AM		

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Augustine Gonzalez	04096	950514	PSA 4
2. POM Herman Lai	01897	949191	PSA 4

Officer(s)	Allegation	Investigator Recommendation
A.POM Augustine Gonzalez	Abuse: Police Officer Augustine Gonzalez entered § 87(2)(b) in Manhattan.	
B.POM Herman Lai	Abuse: Police Officer Herman Lai entered § 87(2)(b) in Manhattan.	
C.POM Herman Lai	Force: Police Officer Herman Lai used physical force against § 87(2)(b)	
D.POM Augustine Gonzalez	Force: Police Officer Augustine Gonzalez used physical force against § 87(2)(b)	
E.POM Herman Lai	Force: Police Officer Herman Lai used pepper spray against § 87(2)(b)	
F.POM Herman Lai	Abuse: Police Officer Herman Lai threatened § 87(2)(b) with the use of force.	
G.POM Herman Lai	Discourtesy: Police Officer Herman Lai spoke discourteously to § 87(2)(b)	
H.POM Augustine Gonzalez	Abuse: Police Officer Augustine Gonzalez video recorded § 87(2)(b) and § 87(2)(b) on his personal cell phone.	
I.POM Herman Lai	Discourtesy: Police Officer Herman Lai spoke discourteously to § 87(2)(b)	

Case Summary

On March 8, 2016, § 87(2)(b) filed this complaint with the CCRB via phone on behalf of herself, her daughter; § 87(2)(b) and her son; § 87(2)(b)

On March 7, 2016, at approximately 7:00 p.m., § 87(2)(b) was involved in a dispute with § 87(2)(b) inside § 87(2)(b) apartment at § 87(2)(b) in Manhattan. § 87(2)(b) called 911 to request police assistance, and PO Augustine Gonzalez and PO Herman Lai of PSA 4 responded. PO Gonzalez entered § 87(2)(b) (**Allegation A**). PO Lai decided to arrest § 87(2)(b) for § 87(2)(b), and both officers grabbed and pulled § 87(2)(b) arms while she stood inside the apartment (**Allegation B, Allegation C, and Allegation D**). PO Lai discharged pepper spray against § 87(2)(b) inside of the apartment (**Allegation E**). PO Lai threatened to use pepper spray against § 87(2)(b) when she attempted to prevent the officers from moving farther into the apartment (**Allegation F**), and PO Lai also said, "Let us the fuck in" to § 87(2)(b) at that time (**Allegation G**). PO Gonzalez video recorded the civilians on his personal cell phone while inside of the apartment (**Allegation H**). PO Gonzalez and PO Lai arrested § 87(2)(b) for § 87(2)(b), and they escorted her out of the apartment and into the elevator. § 87(2)(b) blocked the elevator doors from closing at which point the officers placed him under arrest for § 87(2)(b). The officers re-entered the elevator with § 87(2)(b) and § 87(2)(b) in custody, and § 87(2)(b) entered the elevator behind them. PO Lai allegedly said, "Get the fuck out. Get the fuck out," to § 87(2)(b) as she entered the elevator (**Allegation I**). PO Lai issued § 87(2)(b) five criminal court summonses for multiple counts of § 87(2)(b)

Video footage of the incident was obtained from multiple sources, and the relevant video clips are embedded below. The first embedded video (file 20160424_1500) was provided by § 87(2)(b) next door neighbor (See also BR 05). § 87(2)(b) recorded four separate video clips on his cellphone, which show the officers placing § 87(2)(b) under arrest after the officers' entry into the apartment. These clips were combined in the embedded video below, and the original video clips are located in IAs 53-56 (BR 06). The second embedded video (20160424_1522) was provided by PO Gonzalez, who recorded the incident on his personal cellphone after the officers entered the civilians' apartment (BR 07). PO Gonzalez's original video is located in IA 78 (BR 08). Video footage was also obtained from NYCHA, but this footage did not show any of the allegations and contained no audio. As such, the NYCHA footage was not embedded. The NYCHA footage cannot be played in CTS but can be copied from IA 70 and played using a special player (See BR 09).

§ 87(2)(g)



201601869_20160424_1500_DM.mp4



201601869_20160424_1522_DM.mp4

Mediation, Civil and Criminal Histories

This case was unsuitable for mediation due to § 87(2)(b) and § 87(2)(b) arrests. On April 19, 2016, a request was submitted to the Comptroller's Office for a record of any notice

of claim filed in regards to this incident, and the results are pending. [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Civilian and Officer CCRB Histories

[§ 87(2)(b)] does not have any prior CCRB complaints (BR 11).

[§ 87(2)(b)] filed two prior complaints with the CCRB (case [§ 87(2)(b)] and case

[§ 87(2)(b)] [§ 87(2)(b)]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

This is PO Gonzalez's first CCRB complaint in his four year tenure as an NYPD officer. PO Lai has been a member of the NYPD for five years and has been the subject of three prior CCRB complaints involving five allegations, none of which were substantiated. [§ 87(2)(g)]

Potential Issues

Field work was conducted to the incident location, and one of the civilian witnesses to the incident, [§ 87(2)(b)] was interviewed. A second witness to the incident, [§ 87(2)(b)] refused to provide a statement about the incident.

Findings and Recommendations

Explanation of Subject Officer Identification

[§ 87(2)(b)] alleged that he heard a male voice say, "Let us in. Let us the fuck in [the apartment]," from inside his own apartment next door. [§ 87(2)(b)] alleged that PO Lai told [§ 87(2)(b)] to "move the fuck out of the way." PO Lai acknowledged telling [§ 87(2)(b)] to move out of his way to allow the officers to enter the apartment. PO Gonzalez denied participating in any such conversation. [§ 87(2)(g)]

Allegations not pleaded

Abuse of Authority - Threat of Arrest: [§ 87(2)(b)] alleged that PO Gonzalez threatened to arrest [§ 87(2)(b)] at the doorway of the apartment, and [§ 87(2)(b)] alleged that an unidentified officer made this threat at the conclusion of the incident. It is undisputed that PO Lai attempted to place [§ 87(2)(b)] under arrest, that [§ 87(2)(b)] refused to surrender to him, and that PO Lai used his discretion to issue criminal court summonses to [§ 87(2)(b)] in lieu of her arrest. [§ 87(2)(g)]

Physical Force: It is undisputed that PO Lai made contact with [§ 87(2)(b)] motorized scooter using his foot to prevent [§ 87(2)(b)] from following the officers into the elevator. This

action did not rise to the level of physical force because PO Lai did not make contact with § 87(2)(b) body. § 87(2)(g)

Abuse of Authority - Refusal to Provide Medical Treatment: § 87(2)(b) alleged that two unidentified officers at the PSA 4 stationhouse refused to provide medical treatment to § 87(2)(b) upon her request. § 87(2)(b) stated that officers offered to obtain medical treatment for her but that she refused to receive any medical attention. § 87(2)(g)

Allegation A – Abuse of Authority: Police Officer Augustine Gonzalez entered § 87(2)(b) in Manhattan.

Allegation B – Abuse of Authority: Police Officer Herman Lai entered § 87(2)(b) in Manhattan.

Allegation C – Force: Police Officer Herman Lai used physical force against § 87(2)(b)

Allegation D – Force: Police Officer Augustine Gonzalez used physical force against § 87(2)(b)

It is undisputed that PO Gonzalez and PO Lai entered § 87(2)(b) and it is undisputed that they grabbed and pulled § 87(2)(b) arms to place her under arrest. The apartment in question is a NYCHA residence, and § 87(2)(b) is the owner.

According to all parties, § 87(2)(b) and § 87(2)(b) were involved in a dispute inside § 87(2)(b) apartment (BR 01-03 and 12-13). § 87(2)(b) took § 87(2)(b) camera, and § 87(2)(b) took § 87(2)(b)'s flashlight. § 87(2)(b) then threw § 87(2)(b)'s flashlight out the apartment window, and she called 911. According to the 911 recording, the dispatcher notified PO Lai and PO Gonzalez that there was a family dispute at the incident location and that § 87(2)(b) was eight months pregnant (BR 14). No other information was provided to the officers.

According to all parties, § 87(2)(b) stood at the entrance to the apartment to speak with the officers upon their arrival, and § 87(2)(b) and § 87(2)(b) stood directly behind § 87(2)(b). The officers observed that § 87(2)(b) was visibly pregnant and that § 87(2)(b) was seated in a motorized scooter due to a physical disability. The civilians argued amongst each other about the incident upon opening the door.

According to PO Gonzalez, he asked § 87(2)(b) to step into the hallway in order to separate the civilians because they were arguing, and § 87(2)(b) did so. At approximately the same time, PO Gonzalez entered the apartment by straddling the threshold of the doorway with one foot inside the apartment and one foot in the outside hallway. PO Gonzalez stated that he adopted this position in order to speak with the civilians inside the apartment while also speaking with § 87(2)(b) outside the apartment. All parties acknowledged that § 87(2)(b) objected to PO Gonzalez's presence in the apartment in some capacity. PO Gonzalez acknowledged that § 87(2)(b) told him to remove his foot from the apartment. According to PO Gonzalez, he asked § 87(2)(b) whether he could keep his foot inside the apartment, and § 87(2)(b) allegedly told him that he could do so. § 87(2)(b) confirmed that § 87(2)(b) instructed PO Gonzalez to exit the apartment, and § 87(2)(b) denied telling PO Gonzalez that he could remain in the apartment.

According to all parties, § 87(2)(b) admitted that she threw § 87(2)(b)'s flashlight out the window. The officers then told § 87(2)(b) to retrieve the flashlight multiple times, but § 87(2)(b) refused to do so. According to PO Lai and the civilians, PO Lai told § 87(2)(b)

that she was under arrest, and he grabbed § 87(2)(b) arms to place her in handcuffs. PO Gonzalez also grabbed one of § 87(2)(b) arms at that time. PO Lai stated that he placed § 87(2)(b) under arrest for throwing § 87(2)(b)'s flashlight out the window, which amounted to a misdemeanor charge of § 87(2)(b). Both § 87(2)(b) and PO Lai stated that § 87(2)(b) stood inside the apartment at the time that PO Lai placed her under arrest. PO Lai did not recall specifically when § 87(2)(b) re-entered the apartment, but he stated that she did so prior to being placed under arrest. § 87(2)(b) confirmed that § 87(2)(b) was inside the apartment when the officers grabbed her. § 87(2)(b) believed that § 87(2)(b) stood on the threshold of the doorway, and PO Gonzalez did not know whether § 87(2)(b) was inside or outside of the apartment at the time that PO Lai grabbed her. All parties acknowledged that § 87(2)(b) pulled away from the officers and that she moved backward into the apartment to escape their grip.

PO Lai stated that he lost his grip on § 87(2)(b) when she pulled away, and he stepped into the apartment to pursue her. PO Lai stepped into the apartment to place § 87(2)(b) under arrest for the aforementioned misdemeanor charge of criminal mischief as well as for a misdemeanor charge of resisting arrest. PO Gonzalez maintained his grip on one of § 87(2)(b) arms, and PO Lai observed that PO Gonzalez was completely inside the apartment at that time. PO Gonzalez maintained his grip on § 87(2)(b) while she pulled away, and PO Gonzalez appeared to move forward into the apartment as a result of this pulling.

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PO Gonzalez claimed that he, and not PO Lai, made the decision to arrest § 87(2)(b) and PO Gonzalez claimed that § 87(2)(b) was outside the apartment at the time that he informed her of her arrest. PO Gonzalez claimed that § 87(2)(b) re-entered the apartment only after she was told that she was under arrest. PO Gonzalez also claimed that § 87(2)(b) and § 87(2)(b) grabbed § 87(2)(b) and pulled her farther into the apartment. PO Gonzalez claimed that the resulting momentum of this pull caused him to be pulled completely into the apartment. PO Lai did not see any such incident in which § 87(2)(b) and § 87(2)(b) pulled § 87(2)(b) into the apartment, and he stood less than an arm's length away from the civilians at that time. In a follow-up call to § 87(2)(b) § 87(2)(b) denied that he or § 87(2)(b) pulled § 87(2)(b) into the apartment.

Generally, officers entering a residence to effect an arrest must possess a warrant. Exceptions to this rule include situations involving consent, an emergency, or exigent circumstances. People v. McBride, 14 N.Y.3d 440 (2010). These exceptions are only justified for serious crimes. Welsh v. Wisconsin, 466 U.S. 740 (1984). The following factors have been used to determine if exigent circumstances exist: (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry. People v. McBride, 14 N.Y.3d 440 (2010). The police may also enter a private residence under the "hot pursuit" exigency if they are actively pursuing a suspect who has recently committed a crime; however, hot pursuit generally does not apply when the underlying offense is relatively minor. Welsh v. Wisconsin, 466 U.S. 740 (1984); United States v. Santana, 427 U.S. 38 (1976); People v. Cruz, 41 Misc. 3d 1222(a), 981 NYS2d 637 (2013). In addition, officers must use the minimum necessary force to effect an arrest. Patrol Guide Procedure 203-11 (BR 15-19).

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Allegation E – Force: Police Officer Herman Lai used pepper spray against § 87(2)(b)

It is undisputed that PO Lai used pepper spray against § 87(2)(b). According to § 87(2)(b) and § 87(2)(b), PO Lai discharged one burst of pepper spray lasting one second against § 87(2)(b) while she pulled away from the officers. According to the civilians, the pepper spray struck § 87(2)(b) face, and residual spray made contact with § 87(2)(b) face due to her close proximity to § 87(2)(b). Both officers and all of the civilians were affected by the pepper spray, and they variously coughed and rubbed their eyes. PO Gonzalez later developed asthmatic symptoms as a result of his exposure to pepper spray, and he was transported via EMS to § 87(2)(b) for treatment. Photos of the incident location showed that the civilians and officers stood in a three foot wide hallway at the time of the pepper spray discharge, and all parties were consistent in that the officers and civilians stood within a few feet of each other in this confined space (BR 21).

PO Lai acknowledged that he used pepper spray against § 87(2)(b) in the manner alleged. PO Lai stated that PO Gonzalez held on to § 87(2)(b) arm at the time that he used his pepper spray, and PO Lai stated that § 87(2)(b) was positioned directly behind § 87(2)(b). As a result of this positioning, PO Lai held the bottle of pepper spray approximately 10 inches from § 87(2)(b) face and approximately one and a half feet away from § 87(2)(b) face at the time that he discharged the spray. PO Lai confirmed that he discharged only one burst of pepper spray lasting one second; however, PO Lai stated that the pepper spray emitted in a cloud of mist as opposed to a directed stream because the pepper spray bottle was brand new. PO Lai acknowledged that the resulting mist affected all parties inside the apartment. PO Lai was aware that § 87(2)(b) was eight months pregnant at the time that he discharged his pepper spray.

§ 87(2)(g) . She alleged that PO Lai used pepper spray against § 87(2)(b) prior to placing her under arrest, and she claimed that PO Lai then extended his arm into the apartment and discharged the spray for a second time while waving the bottle back and forth indiscriminately. § 87(2)(b) and the officers denied that this occurred.

Officers must use the minimum necessary force to effect an arrest. Patrol Guide Procedure 203-11. Officers should discharge pepper spray from a minimum distance of three feet and only in situations when the officer reasonably believes it to be necessary to effect an arrest. If possible, officers should avoid using pepper spray on women believe to be pregnant. Pepper spray shall not be used in situations that do not require the use of force. Patrol Guide Procedure 212-95 (BR 19-20).

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[REDACTED]

Allegation F – Abuse of Authority: Police Officer Herman Lai threatened § 87(2)(b) with the use of force.

It is undisputed that PO Lai threatened to use pepper spray against § 87(2)(b). § 87(2)(b) retreated farther into the apartment after being affected by the pepper spray. According to § 87(2)(b), PO Lai and PO Gonzalez instructed § 87(2)(b) to move out of the way so as to allow them to pursue § 87(2)(b) into the apartment, but § 87(2)(b) refused to move. During that conversation, § 87(2)(b) alleged that PO Lai threatened to use pepper

spray against § 87(2)(b) if she did not allow the officers to move into the apartment. Neither § 87(2)(b) nor § 87(2)(b) made this allegation, and § 87(2)(b) who was inside the apartment next door, could not clearly hear everything that was said at that time.

PO Lai acknowledged that he threatened to use pepper spray against § 87(2)(b) if she did not move out of the officers' way. PO Lai issued this threat because § 87(2)(b) blocked the officers' path farther into the apartment, and the officers needed to move past § 87(2)(b) to arrest § 87(2)(b). PO Lai did not ultimately use pepper spray against § 87(2)(b). PO Gonzalez denied that § 87(2)(b) blocked the officers' path, and he did not recall whether PO Lai threatened to use pepper spray against § 87(2)(b).

Officers may use pepper spray when they reasonably believe it to be necessary to effect an arrest. Officers are prohibited from using pepper spray against subjects who passively resist. Patrol Guide Procedure 212-95 (BR 20).

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Allegation G – Discourtesy: Police Officer Herman Lai spoke discourteously to § 87(2)(b)

During § 87(2)(b) argument with PO Lai, § 87(2)(b) heard PO Lai say, "Move the fuck out of the way." § 87(2)(b) heard a male voice say, "Let us in. Let us the fuck in" from inside his next door apartment. Neither § 87(2)(b) nor § 87(2)(b) made this allegation.

PO Lai acknowledged that he instructed § 87(2)(b) to move out of the officers' way multiple times. PO Gonzalez denied that the officers had any conversation in which PO Lai told § 87(2)(b) to let them into the apartment or to move out of their way. PO Lai did not recall whether he used any profanity as alleged during this conversation. PO Lai stated that he "might have" used the word "fuck" when speaking with § 87(2)(b) at later parts of the incident (Discussed in **Allegation I**). However, video and audio recordings of these moments revealed that PO Lai did not use profanity during these occasions (See **Allegation I**). PO Lai also stated that he did not consider the use of the word "fuck" to be profane. PO Lai held this belief because he claimed that the word "fuck" is commonly used and is not always discourteous.

Officers must be courteous and respectful in the interactions with the public. Patrol Guide Procedure 203-09 (BR 22).

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Allegation H – Abuse of Authority: Police Officer Augustine Gonzalez video recorded § 87(2)(b) and § 87(2)(b) on his personal cell phone.

It is undisputed that PO Gonzalez video recorded § 87(2)(b) and § 87(2)(b) on his personal cell phone.

According to § 87(2)(b) and the officers, PO Gonzalez and PO Lai moved around § 87(2)(b) motorized wheelchair to pursue § 87(2)(b). The officers walked down the hallway of the apartment and entered the kitchen. The officers placed § 87(2)(b) in handcuffs in the kitchen and then walked back toward the front door of the apartment. At that time, the officers told § 87(2)(b) that she was blocking their way out of the apartment, and PO Gonzalez appeared to direct his cell phone toward § 87(2)(b) as though video recording her.

According to the officers, § 87(2)(b) closed and locked the apartment door behind them once they handcuffed § 87(2)(b). The officers asked § 87(2)(b) to allow them to exit the apartment, but § 87(2)(b) refused to do so. PO Gonzalez acknowledged that he then video recorded the civilians on his personal cell phone, and PO Gonzalez provided this video to the CCRB. PO Gonzalez stated that he did not have his Department issued cell phone on his person at the time of the incident, and he stated that he video recorded the civilians to “cover himself.”

The officers moved past § 87(2)(b) unlocked the door, and exited the apartment with § 87(2)(b) in custody. PO Gonzalez placed his cellphone in his front shirt pocket and continued to record the incident while in the hallway. PO Gonzalez did not notify a supervisor that he possessed a recording of the incident, and he did not invoice the recording into evidence. PO Gonzalez stated that he was not required to invoice the video as evidence.

Officers are prohibited from using any personal electronic/digital device (e.g., cellular phone, camera, etc.) to record video and/or audio or take photographs during any police encounter (BR 23). Officers may only record encounters when prior supervisory authorization is obtained and when authorized Department technology is utilized. Law enforcement recordings are subject to preservation and discovery rules, and any such recordings must be promptly made available to the relevant prosecutor’s office or the New York City Law Department. Patrol Guide Procedure 203-06.

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Allegation I – Discourtesy: Police Officer Herman Lai spoke discourteously to § 87(2)(b)

The officers escorted § 87(2)(b) to the elevator in the hallway outside § 87(2)(b) apartment, and § 87(2)(b) and § 87(2)(b) followed them. The civilians loudly protested the officers’ actions while using profanity, and § 87(2)(b) referred to PO Lai, who is Asian, as a

“chink” multiple times. According to § 87(2)(b) and the officers, the officers entered the elevator with § 87(2)(b) and § 87(2)(b) instructed § 87(2)(b) to block the elevator door. § 87(2)(b) blocked the elevator door from closing, and the officers exited the elevator to place § 87(2)(b) under arrest for obstructing governmental administration. At that time, § 87(2)(b) exited his apartment and video recorded the incident on his cell phone (See embedded video). Several additional civilians, including § 87(2)(b) also exited their apartments to observe the incident. § 87(2)(b) called 911 to request an ambulance for § 87(2)(b) and the 911 recording of that call captured the remainder of the incident on audio recording (BR 24).

§ 87(2)(b) stated that she grabbed the collar of PO Lai’s jacket while he placed handcuffs on § 87(2)(b) in order to read PO Lai’s shield number. § 87(2)(b) stated that PO Lai brushed her hand away and told her not to touch him. § 87(2)(b) did obtain PO Lai’s shield number by reading the number from his shield. PO Lai stated that he “might have” told § 87(2)(b) in substance, “Get your fucking hands off me,” when § 87(2)(b) grabbed him. None of the civilians made that allegation. Neither the audio from PO Gonzalez’s phone nor the audio from § 87(2)(b) 911 call recorded that comment, and these recording captured the part of the incident in which PO Lai claimed he may have used profanity. § 87(2)(b)’s video footage did not capture the part of the incident in question.

The officers placed § 87(2)(b) and § 87(2)(b) in the elevator, and § 87(2)(b) drove her motorized wheelchair toward the elevator to enter behind the officers. The civilians and officers exited from § 87(2)(b)’s view as they moved toward the elevator. § 87(2)(b) walked toward the elevators at which point he allegedly heard PO Lai say, “Get the fuck out. Get the fuck out.” PO Lai stated that he “might have” told § 87(2)(b) to “get the fuck out” of the elevator, but he did not specifically remember making this comment. None of the other civilians made that allegation. Neither the audio from PO Gonzalez’s phone nor the audio from § 87(2)(b) 911 call recorded the alleged comment, and both recordings captured the part of the incident in which PO Lai allegedly made that comment. § 87(2)(b)’s video footage did not record the alleged comment, but the footage did not appear to capture the complete interaction in the elevator.

§ 87(2)(b) ultimately entered the elevator and descended to the ground floor with the officers. An ambulance arrived on the scene, and § 87(2)(b) refused medical treatment. § 87(2)(b) and § 87(2)(b) were then transported to the PSA 4 stationhouse for arrest processing.

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Squad:

Investigator: _____
Signature Print Date

Squad Leader: _____
Title/Signature Print Date

Reviewer:

Title/Signature

Print

Date